

1 KAREN A. OVERSTREET
Bankruptcy Judge
2 United States Courthouse
700 Stewart Street, Rm. 6301
3 Seattle, WA 98101-1271
(206) 370-5330
4

5 UNITED STATES BANKRUPTCY COURT
6 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 In re)
8) Chapter 7
JONATHAN WULF,)
9) Bankruptcy No. 07-14288
10 Debtor.)
11) **MEMORANDUM DECISION ON MOTION**
12) **TO DISMISS CASE UNDER 11 USC**
13) **§§ 707(b)(1) and (3)**

14 This matter came before the Court on the United States
15 Trustee's Motion to Dismiss for abuse under 11 U.S.C.
16 §§ 707(b)(1) and (3).¹ This is not a case where the presumption
17 of abuse arises under § 707(b)(2)(A)(i). Rather, the United
18 States Trustee contends that under the facts of this case,
19 granting relief under Chapter 7 would be an abuse either because
20 the debtor, Jonathan Wulf (the "Debtor"), filed the petition in
21 bad faith, § 707(b)(3)(A), or, based on a totality of the
22 circumstances, the Debtor's financial situation demonstrates
23 abuse, § 707(b)(3)(B). The Debtor opposed the motion and the
24 Court heard oral argument on January 18, 2008.

25 Due to the importance of the issues presented, the Court

26 ¹ Unless otherwise indicated, all Chapter, Section and Rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*
and to the Federal Rules of Bankruptcy Procedure, Rules 1001 *et*
28 *seq.*

1 took the matter under advisement. Based on the pleadings and the
2 record, and applicable case law, the Court finds that granting
3 Chapter 7 relief to the Debtor would be an abuse.

4 **I. FACTUAL BACKGROUND**

5 This case was filed on September 11, 2007. The Debtor is a
6 psychologist at Swedish Hospital with steady employment and
7 primarily consumer debts. He was divorced in 2001 and is
8 currently unmarried. He has two adult daughters for whom he no
9 longer has court-ordered child support payments. Starting in
10 2002, the Debtor voluntarily took on parent loans for six years
11 of his daughters' combined college costs, totaling \$50,000, and
12 paid approximately \$20,000 in out-of-pocket costs related to
13 their education. Declaration of Jonathan Wulf ("Wulf Decl."),
14 paras. 4, 5 and 7. The Debtor had previously incurred
15 approximately \$45,000 of his own student loan debt. *Id.*, para. 1.
16 Schedule F, as amended (docket no. 10), lists \$100,000 in student
17 loan debt owed to Sallie Mae, incurred from 1989 to 2006, and
18 Schedule J lists student loan payments of \$700/month.²

19 In August 2006, the Debtor contacted an attorney about the
20 possibility of filing a bankruptcy. At that time he was told he
21 would not qualify for a chapter 7 because of his income, even
22 though he had "high debt and very little disposable income."
23 Wulf Decl., para 9.

24
25 ² All versions of schedule J filed by the Debtor indicate a
26 \$700 per month student loan payment. The Debtor's declaration,
27 paragraph 9, however, states that his loan payments were \$950 per
month. At the hearing, Debtor's counsel indicated that the loans
had been consolidated to the \$700 per month amount.

1 In March of 2007, despite his financial problems, the Debtor
2 purchased his current residence, a two-bedroom condominium, for
3 approximately \$355,000. See Transcript of Debtor's 341
4 testimony, attached to Declaration of Sheila O'Sullivan, docket
5 no. 20 ("341 Testimony"). The monthly mortgage payments on the
6 condominium are \$3,138.92³, plus \$442 in homeowner's dues. The
7 Debtor had previously rented a one-bedroom apartment for \$1,095
8 per month. The Debtor's declaration states that he purchased the
9 condominium because he anticipated his apartment rent was going
10 to increase by \$250 per month and he had "heard rumors" that the
11 apartment building could be converted to condominiums. Wulf
12 Decl., para. 10. The Debtor stated he also wanted a two-bedroom
13 unit to accommodate his daughter when she visited from college.
14 *Id.*

15 On the loan application for the condominium purchase, the
16 Debtor listed his monthly income as \$14,000. 341 Testimony,
17 p. 3. The Debtor's means test forms and schedules, however,
18 demonstrate that his actual monthly income at the time was closer
19 to \$7,000. *Id.* During the year prior to filing bankruptcy, the
20 Debtor incurred over \$20,000 in credit card debt in the form of
21 cash advances. 341 Testimony, p. 7. That money was used in part

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23 ³ There are discrepancies in the documents filed as to
24 whether the \$3,138.92 includes King County property taxes of
25 \$268.33 per month. On Schedule J, the Debtor consistently lists
26 his mortgage payment as \$3,138.92, inclusive of real estate
27 taxes. The initial means test form, line 42, gave an inclusive
number of \$3,849.99 for the condominium payment. The subsequent
amended means test form omitted property taxes but stated a
monthly payment for the mortgages and homeowner's dues of
\$3,581.66. This discrepancy was not resolved at the 341 meeting.
See 341 Testimony, p. 4-5.

1 to inflate his checking account so that he would qualify for the
2 loan on his condominium purchase. *Id.*, p. 6. The funds were
3 also used for living expenses, including the purchase of a 1986
4 BMW 535i.⁴

5 Determining the Debtor's income has been somewhat of a
6 moving target. Three sets of schedules I and J have been filed,
7 as summarized below:

8 9 Date of Schedules I and J	Monthly Gross Income	Average Monthly Income	Expenses	Net Income
10 11 Initial Schedules filed 9/11/07	\$7,894.92	\$5,346.85	\$6,049.50	\$702.65
12 13 14 Second set: Amended I filed 10/18/07; amended J filed 11/20/07	\$7,894.92	\$6,332.69	\$5,999.50 ⁵	\$333.19
15 16 Third set of Schedules I and J filed 1/21/08 ⁶	\$6,880.00	\$5,332.36	\$5,999.50	\$677.14

17 The Debtor's income and expenses are also set forth in the
18

19 ⁴ The Debtor's schedules indicate he also owns a 1995 Isuzu
20 Rodeo.

21 ⁵ The difference is due to a reduction in the line item for
22 telephone, which went from \$175 to \$125.

23 ⁶ During oral argument on the instant motion, the Debtor's
24 counsel raised a concern that the Debtor's income figures were
25 incorrectly stated on the amended Schedule J and the amended
26 means test form. Counsel contended that the Debtor's annual
27 income was closer to \$81,000 than \$94,000. After the hearing,
the Debtor filed third amended Schedules I and J and an amended
means test form. See Declaration of Sheila O'Sullivan, docket
entry #22, and the amended pleadings referred to therein. The
United States Trustee filed a response to the new numbers. See
docket entry #25.

Chapter 7 Statement of Current Monthly Income and Means-Test Calculation, Form 22A. The initial means test form filed by the Debtor on September 12, 2007 ("First Means Test"), stated a gross monthly income of \$7,428.29, annualized to \$89,146.88. The total expenses allowed under the IRS standards listed on line 33 were \$3,618.99. An amended means test form was filed on November 20, 2007 ("Second Means Test"), stating the same gross income, but with different deductions under Part V. After the hearing, a third amended means test form was filed ("Third Means Test"), this time reflecting monthly gross income of \$6,898.26, annualized to \$82,779.12. The various means test forms also differ in terms of the deductions claimed. The differences are summarized below:

line item/description	First Means Test (9/12/07)	Second Means Test (11/20/07)	Third Means Test (1/21/08)
3. Gross wages monthly	\$7,428.89	\$7,428.89	\$6,898.26
19. food, clothing, misc.	\$916.00	\$1,306.00	\$1,306.00
20B. (b) avg monthly payment for debts secured by home	\$3,849.99	\$3,581.66	\$3,581.66
25. Other necessary expenses: Taxes	\$1,526.99	\$1,526.99	\$1,417.93
33. Total Expenses Allowed under IRS Standards	\$3,618.99	\$ 4,008.99	\$4,099.93
42. Future payments on secured claims	\$3,849.99	\$3,581.66	\$3,581.66
47. Total deductions under § 707(b)(2)	\$7,468.98	\$7,590.65	\$7,681.59

1 (line 47) of \$7,681.59, including both a vehicle operation
2 expense of \$529 (line 22) and a vehicle ownership expense of \$471
3 (line 23). Because the Debtor owns his vehicle free and clear of
4 liens he is not entitled to the ownership expense deduction. See
5 *Ransom v. MBNA America Bank, N.A. (In re Ransom)*, BAP No. NV-07-
6 1254 (9th Cir. BAP 2007); *In re Patricia Ann Cole*, 07-10264-KAO,
7 Memorandum Decision, docket entry no. 30. As noted above in
8 footnote 3, it does not appear that the real estate taxes on the
9 condominium of \$268.33 have been included in line 42 of the
10 deductions. Finally, at line 25, the Debtor lists taxes of
11 \$1,417.93, yet the third amended Schedule I lists taxes as
12 \$1,414.66. Using the \$1,414.66 amount, and making the other
13 changes noted above, the Debtor's total deductions in line 47
14 should be \$7,475.65, which is just slightly over his monthly
15 gross income of \$7,429.

16 **2. Hypothetical Means Test.**

17 The United States Trustee has not suggested that the Debtor
18 bought the condominium for the sole purpose of avoiding the
19 presumption of abuse under the means test. The Debtor admits in
20 his declaration, however, that when he consulted a bankruptcy
21 attorney in August of 2006, he was told that because of his high
22 income he would not qualify for chapter 7 relief and would
23 instead have to file a chapter 13. The Debtor's purchase of the
24 condominium significantly increased his secured debt enabling him
25 to pass the means test under chapter 7, at least on a
26 mathematical basis.

27 Comparing the Debtor's actual means test figures, as revised

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1 above, to how the Debtor's means test form would have looked had
2 he not purchased the condominium is very instructive. On line
3 20B of the means test form (Local Standards: housing and
4 utilities), instead of zero, the Debtor would have been entitled
5 to the housing allowance for King County of \$1,205, increasing
6 his IRS allowed deductions to \$4,830.66 on line 33. The Debtor
7 would not have been able to deduct \$3,581.66 for mortgage
8 expenses on line 42. Instead, the amount on that line would have
9 been zero. Thus, his total allowed deductions on line 47 would
10 have been \$4,830.66. Deducting that amount from current monthly
11 income of \$7,429 would leave \$2,598.34 in monthly disposable
12 income on line 50. If that amount is then multiplied by 60
13 months (because the Debtor is an above median income debtor), the
14 total is \$155,900.40. This amount is 70% of the Debtor's total
15 nonpriority unsecured debt of \$222,634, significantly in excess
16 of the threshold amount of 25% of unsecured debt used under
17 § 707(b)(2), which would be \$55,658.50.

18 As of March 2007, when the Debtor purchased the condominium,
19 his financial circumstances were as described in his declaration.
20 He had become divorced from his wife and in that process assumed
21 their community debt. He had student loans for himself and his
22 daughters' college education in the amount of \$100,000. He had
23 revolving consumer debt approaching \$100,000. Wulf Decl., paras.
24 5 - 8. At the same time, the Debtor had average monthly income
25 of about \$7,429, and his rent was only \$1,095 per month. 341
26 Transcript, p. 4. Based on the hypothetical above, he would have
27 had \$2,598.34 in monthly disposable income to pay his student

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1 loan of \$700 plus a substantial dividend to his other unsecured
2 creditors. Instead of pursuing a chapter 13 plan under those
3 terms, however, the Debtor obtained a loan to purchase a
4 condominium he clearly could not afford, based upon a falsified
5 mortgage loan application, using cash advances from credit cards
6 to inflate his bank account to make it appear he had sufficient
7 cash to support the mortgage loan. After qualifying for the
8 loan, the Debtor did not repay the cash advances to the credit
9 card companies from which he obtained the funds; instead, he
10 spent the money on unspecified living expenses and the purchase
11 of a used BMW. 341 Transcript, p. 7.

12 The means-test format has been criticized as providing
13 debtors an incentive to minimize their current monthly income
14 while maximizing their allowed deductions. *See Means Testing in*
15 *the New § 707(B)*, Judge Eugene Wedoff, 79 Am. Bankr. L. J. 231
16 242 (Spring 2005). *See also Judicial Discretion to Find Abuse*
17 *under § 707(B)(3)*, Judge Eugene Wedoff, 25-APR Am. Bankr. Inst.
18 J. 1 (April 2006). In this case, the hypothetical means test
19 depicting the Debtor's financial situation before the condominium
20 purchase suggests the Debtor did precisely what Judge Wedoff
21 describes: the Debtor's purchase of the condominium increased
22 his allowed deductions so that he went from having \$2,598.34 in
23 monthly disposable income to having nothing to pay to unsecured
24 creditors.

25 **B. Determination of Substantial Abuse.**

26 Section 707(b) requires the court to determine, on a motion
27 by the United States Trustee, whether granting relief under

1 chapter 7 would be "an abuse" of the provisions of chapter 7.
2 Prior to the enactment of the Bankruptcy Abuse Prevention and
3 Consumer Protection Act of 2005 (BAPCPA), the test under § 707(b)
4 was for "substantial" abuse. Clearly, Congress has indicated an
5 intention that some level of abuse less than "substantial" will
6 now suffice. Section 707(b)(3) permits the court to dismiss a
7 case for abuse *even if* the presumption of abuse provided for in
8 § 707(b)(2) does not arise. Section 707(b)(3) permits dismissal
9 if the "totality of the circumstances" demonstrates that
10 chapter 7 relief would be an abuse.

11 The totality of circumstances test is not new in the Ninth
12 Circuit. In *In re Price*, 353 F.3d 1135 (9th Cir. 2004), a case
13 decided prior to the enactment of BAPCPA, the Ninth Circuit
14 enumerated six factors to be considered in determining whether to
15 dismiss a consumer debtor's chapter 7 case as a "substantial
16 abuse" pursuant to the former version of § 707(b):

17 1) whether the debtor has a likelihood of sufficient future
18 income to fund a Chapter 11, 12, or 13 plan which would pay
a substantial portion of the unsecured claims;

19 2) whether the debtor's petition was filed as a consequence
of illness, disability, unemployment, or some calamity;

20 3) whether the schedules suggest the debtor obtained cash
21 advancements and consumer goods on credit exceeding his or
her ability to repay them;

22 4) whether the debtor's proposed family budget is excessive
23 or extravagant;

24 5) whether the debtor's statement of income and expenses
misrepresents the debtor's financial condition; and

25 6) whether the debtor has engaged in eve-of-bankruptcy
26 purchases.

27 *Price*, 353 F.3d at 1139. These factors, when applied to the

1 circumstances in this case, mandate the denial of chapter 7
2 relief to the Debtor.

3 Prior to the condominium purchase in March 2007, the Debtor
4 certainly had the future income to repay a substantial portion of
5 his debts under a chapter 11 or 13 plan, even allowing for the
6 \$100,000 in college expenses he voluntarily assumed. The
7 Debtor's prebankruptcy decision to devote 57% of his income to a
8 condominium purchase dramatically altered the landscape for his
9 unsecured creditors.

10 The Debtor's housing expenses after the condominium purchase
11 are excessive. Although the Court does not hold as a matter of
12 law that a bankruptcy filing is abusive if a debtor spends 57% of
13 his or her monthly income on home ownership expenses, under the
14 facts of this case, the housing expense is excessive. Further,
15 given the unique facts of this case, the Court considers the
16 Debtor's purchase of a \$355,000 condominium within the six months
17 preceding the filing to be an "eve of bankruptcy" purchase.

18 Even if the Debtor retains the condominium, it appears he
19 could fund a plan that would pay at least 25% to his unsecured
20 creditors. The Debtor's most recent Schedule J includes monthly
21 transportation costs of \$364.58, in addition to monthly parking,
22 recreation costs of \$200, and pet care of \$60, all of which
23 appear to be excessive given the circumstances. Schedule J
24 includes \$45 for water and sewer which are covered by the
25 Debtor's homeowners' dues (341 Transcript, p. 10 - 11), and \$50
26 as support for dependents, despite the fact that the Debtor's
27 daughters are both over 20 years old. The student loan expense

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1 of \$700 can be paid through a chapter 13 plan. In order to pay
2 25% of his unsecured debt of \$224,634, the Debtor must make a
3 monthly payment of at least \$936. Admittedly, the budget to fund
4 such a plan would be lean. However, the Debtor took a gamble in
5 buying the condominium - at the risk of his unsecured creditors -
6 and will have to make sacrifices if he wants to retain the
7 condominium at their expense.

8 There are no considerations of illness, disability or other
9 calamity which precipitated the instant bankruptcy filing. The
10 Debtor has been steadily employed as a professional. His
11 purchase of the condominium certainly does not qualify as a
12 legitimate consequence of financial hardship.

13 Finally, the record demonstrates that the Debtor took cash
14 advances for the sole purpose of misrepresenting to his mortgage
15 company that he had sufficient cash to qualify for a mortgage
16 loan. There is no evidence that the Debtor had the ability to
17 repay these cash advances; in fact, he used them for living
18 expenses.

19 CONCLUSION

20 Based upon the factors set forth in *Price*, and the totality
21 of circumstances in this case, the Court concludes that granting
22 chapter 7 relief to the Debtor would be an abuse. The Debtor
23 will either have to pay his debts outside of bankruptcy or obtain
24 a discharge through a payment plan under chapter 11 or 13.

1 The United States Trustee is instructed to submit an order
2 consistent with the Court's ruling herein.

3 DATED this 26th day of February, 2008.

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5 KAREN A. OVERSTREET
6 United States Bankruptcy Judge
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